Nos. 79-1708, 79-1716 and 79-171

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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

S & E SHIPPING CORP., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Commission correctly concluded that unittrain rates on wheat from the Twin Cities and Twin Ports to Martins Creek, Pennsylvania, do not discriminate against lake carriers in violation of former Section 3(4) of the Interstate Commerce Act.

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A-1 to A-25)[1] is reported at 568 F. 2d 887. The decision of the Commission upon remand from the court of appeals (Pet. App. A-26 to A-44) is reported at 356 I.C.C. 82. The second opinion of the court of appeals (Pet. App. A-45 to A-57) is reported at 600 F. 2d 349. The earlier decisions of the Commission are reported at 346 I.C.C. 814 and 351 I.C.C. 470.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1979, and petitions for rehearing were denied on January 31, 1980 (Pet. App. A-61 to A-63). The petitions for a writ of certiorari were filed on April 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Former Section 3(4) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 3(4) (recodified as 49 U.S.C. 10701(c)) is reproduced at Pet. App. A-64.

STATEMENT

This case involves a comparison of transportation rates for wheat over two different routes from certain origin points in the Midwest to Martins Creek, Pennsylvania, where respondent ConAgra, Inc., operates a flour mill. The origin points are Minneapolis and St. Paul, Minnesota (Twin Cities) and Duluth, Minnesota and Superior, Wisconsin (Twin Ports). There are no material differences between the rates from either origin, and for purposes of this case they may be considered as a single Midwest origin.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1708.

The first route is from the Midwest via lake carriers to Buffalo, New York, and from Buffalo via railroad (the Erie Lackawanna Railway Company, or Erie)[2] to Martins Creek (the "lake-rail route"). The second route is an all-rail route from the Midwest to Chicago, Illinois, via respondent Soo Line Railroad Company (Soo), and from Chicago to Martins Creek via the Erie (see map at Pet. App. A-10).

At all times material to this case, the Erie offered a five-car rate from Buffalo to Martins Creek of 40 cents per 100 pounds. During the months when the Great Lakes are open for navigation, the total rate for the lake-rail route from the Midwest to Martins Creek was 71.67 cents per 100 pounds (Pet. App. A-29).

In 1973, when ConAgra opened its mill at Martins Creek, the Soo and the Erie published a tariff jointly proposing a summer "unit-train" rate over the all-rail route of 72.25 cents per 100 pounds in order to be competitive with the lake-rail route (Pet. App. A-10, A-29, A-48). A unit-train consists of 50 or more cars, delivered as a unit, and is generally a more efficient and economical means of handling bulk shipments than movement by single or five-car lots (*id.* at A-52). Unit-trains are not offered, however, from Buffalo to points eastward, such as Martins Creek (*id.* at A-48).

Petitioners protested the proposed unit-train rates, contending that they discriminated against shippers, lake carriers and the port of Buffalo in violation of former Sections 3(1) and 3(4) of the Interstate Commerce Act

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[2]When the Commission commenced its investigation in 1973, the rail carrier from Buffalo to Martins Creek and from Chicago to Martins Creek was the Erie, which has since been acquired by respondent Consolidated Rail Corporation (Conrail). The rail carrier will be referred to herein simply as the Erie.

(recodified as 49 U.S.C. 10741(b) and 10701(c)).[3] Section 3(1) provides in pertinent part that "[i]t shall be unlawful for any common carrier subject to the provisions of this chapter * * * to subject any * * * person, company * * * port [etc.] to any undue or unreasonable prejudice or disadvantage * * *."[4] Section 3(4) provides in pertinent part: "All carriers subject to the provisions of this chapter * * * shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." Petitioners contended, among other things, that the rail portion of the lake-rail route (*i.e.*, from Buffalo to Martins Creek) yielded a higher profit per mile to the Erie than the Erie's division of the all-rail route; that the rate on the all-rail route diverted traffic from the lake-rail route; and that the disparity in rates was not justified.

In 1976, after an investigation, the Commission approved the rates and discontinued the investigation (Pet. App. A-12). The Commission concluded that because the protesting lake carriers were exempt from Commission regulation by former Section 303(b) of the

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[3]The Interstate Commerce Act was recodified by Pub. L. No. 95-473, 92 Stat. 1337, but the recodification was not intended to make any substantive change in the law. Like the decisions of the Commission and the court of appeals, we will refer here to the former sections of the Act.

[4]Section 3(1) contains a limiting proviso stating:

> *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

The petitions for a writ of certiorari do not present any questions concerning petitioners' original Section 3(1) claims, and the scope of that section is not before this Court.

Act (recodified as 49 U.S.C. 10542),[5] they were not entitled to the protections of Section 3(4) (Pet. App. A-16). It also concluded that in any event Section 3(4) would not apply to these routes because the section applies only to "connecting carriers" and no such connecting carriers were involved here, since there is no point of interchange between the lake-rail route and the all-rail route (Pet. App. A-19 to A-20). In addition, the Commission rejected the claim that the rail carriers' rate discriminated against Buffalo in violation of Section 3(1) (Pet. App. A-23 to A-25).

On the initial petition for review, the court of appeals in 1977 upheld the Commission's rejection of petitioners' claims based on Section 3(1) (Pet. App. A-23 to A-25). However, the court disagreed with the Commission's conclusions that Section 3(4) does not protect exempt carriers and that Section 3(4) would not in any event apply to these routes (Pet. App. A-15 to A-22). It therefore remanded the case to the Commission for a determination of the merits of the Section 3(4) claim (Pet. App. A-22, A-25).

On remand, the Commission concluded that the rates did not violate Section 3(4) (Pet. App. A-26 to A-44). Although the Commission acknowledged that the Erie derived a higher net profit per mile on the movements from Buffalo to Martins Creek than on the unit-train movements over the all-rail route from the Midwest to Martins Creek, it found that, in view of traffic congestion and other operational deficiencies at Buffalo, "comparable unit-train service from Buffalo to Martins Creek would be inefficient and uneconomical * * *" (*id.*

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[5]Former Section 303(b) of the Act provided: "Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk * * *."

at A-42). The Commission concluded that these facts established significant operating differences that justified the disparity in rates under the standards established in *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 246 (1965) (Pet. App. A-40 to A-42).

On review, the court of appeals, one judge dissenting, affirmed the Commission's conclusion that operating differences between the Buffalo-Martins Creek rail movements and the all-rail movements from the Midwest to Martins Creek justified the disparity in the rates (Pet. App. A-45 to A-57).[6] The court also noted (*id.* at A-52 to A-53) that additional evidence received by the Commission established that

> between 1973 and 1976, annual shipments of wheat to Buffalo by lake carrier increased by over 16.5 million tons, or approximately fifty percent. It disclosed also that, despite the adoption of the challenged unit-train rates, about fifty percent of ConAgra's wheat requirements are still transported by lake carrier and seventy percent of all grain movements from Buffalo to Martins Creek are by truck. This evidence gives little support to petitioner's claim of discrimination.

ARGUMENT

1. This case presents no conflict with the decisions of this Court or any court of appeals. In essence, the Commission's decisions upholding the lawfulness of the unit-train rates at issue are based on the Commission's expert appraisal of record evidence showing that the

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[6]The court also held that the five-car rate of 40 cents per 100 pounds for the rail movement from Buffalo to Martins Creek did not itself discriminate against lake carriers because that rate applied equally to traffic originating from the lake carriers and traffic originating from other rail carriers (Pet. App. A-50 to A-51).

operating conditions over the routes to which the unit-train rates apply were substantially different than the conditions found along the route on which the unit-train rate was not offered. The Commission's expert appraisal of the facts of this case does not present a question of general importance worthy of this Court's review.

Moreover, the court of appeals correctly upheld the Commission's conclusion that the facts did not establish discrimination in violation of Section 3(4).

Petitioners do not dispute the Commission's finding that substantial operating differences between the all-rail route from the Midwest to Martins Creek and the lake-rail route precluded unit-train service on the rail portion of the lake-rail route. Thus, the Commission found (Pet. App. A-41) that a chaotic traffic situation existed at the Buffalo terminal, causing inordinate traffic congestion and delay on rail shipments to Martins Creek. The elapsed time between the arrival of cars at Buffalo for loading and the arrival at Martins Creek for unloading was as much as 24 days, or three to four times as long as for the haul from Twin Ports to Martins Creek via unit-train (*id.* at A-42). The Commission also found a lack of elevator and storage facilities at Buffalo capable of accommodating three consecutive 50-car trainloads of grain and that the weather frequently brings about delays in the handling of freight cars at Buffalo (*id.* at A-41 to A-42); see also *id.* at A-35 to A-36, A-51 to A-52.

Petitioners nevertheless contend (79-1708 Pet. 11-12; 79-1716 Pet. 9; 79-1718 Pet. 11) that differences in rates can be based only on differences in the costs of transportation and that the unit-train rates therefore violated Section 3(4) because the Erie obtained a higher profit per mile from the Buffalo-Martins Creek part of the lake-rail route than from its division of the unit-train rates on the all-rail route. But petitioners' claim that only cost

differences can justify differences in rates is incorrect. Indeed, if that were the law, almost every rail rate in the country would have to be fixed at the identical revenue/cost ratio (*i.e.*, identical level of profit).

The Act does not mandate such an inflexible and unrealistic approach. Thus, in *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 246 (1965), relied on by the Commission (Pet. App. A-40), this Court stated:

> Relief [under Section 3(4)] is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the alleged discriminating carrier.

Similarly, in *Atlantic Coast Line R.R.* v. *United States*, 205 F. Supp. 360, 365 (M.D. Ga.) (three-judge court), aff'd, 371 U.S. 6 (1962), relied on by the court of appeals (Pet. App. A-51), the court, in addressing a claim of discrimination under Section 3(4), stated that "equality of treatment involves comparable conditions * * *."

These cases and others establish that factors other than cost may justify disparities in rates. In *Western Pacific*, for example, this Court expressly chose the words "operating conditions" rather than "operating costs" in stating the governing standard. 382 U.S. at 246. "Operating conditions" is a much broader term and embraces factors other than cost. Indeed, in *Atchison, T. & S. F. Ry.* v. *United States*, 218 F. Supp. 359, 367 (N.D. Ill. 1963), which this Court cited in *Western Pacific* in support of its Section 3(4) test, the three-judge district court held that such factors as strong motor competition and time-consuming terminal operations may properly be considered in determining whether a substantial similarity in transportation conditions exists between two areas. Moreover, in *Western Pacific*, after this Court remanded the case to the district court, that court considered

differences in transport time and loss of freight car utilization as between the favored and disfavored rail routes to determine whether there was a dissimilarity in operating conditions over those routes. *Western Pacific R.R.* v. *United States*, 263 F. Supp. 140, 151-152 (N.D. Cal. 1966).[7] See also *National Ass'n of Recycling Industries, Inc.* v. *ICC*, No. 79-1393 (D.C. Cir. Apr. 25, 1980), slip op. 17-18, recognizing that competition by motor carriers or barge lines for traffic in a particular commodity (which would call for a relatively lower rate) is a relevant difference in transportation conditions that may justify rate disparities. The factors considered in the foregoing cases are not quantifiable as differences in cost. Accordingly, these cases demonstrate that the Commission may consider a wide variety of operating characteristics in determining whether a rate disparity is justified.[8]

Because the Commission properly followed this Court's rule in *Western Pacific* and the case is bottomed on the Commission's expert judgment which the lower court properly upheld, it does not warrant this Court's review. See *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353 (1940).

2. The Commission's conclusion that the rates in this case were not unlawful is strongly reinforced by former

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[7]However, under the particular facts of that case the district court was unpersuaded that there were differences in operating conditions that substantially affected the discriminating carriers. 263 F. Supp. at 147, 151, 152.

[8]Both the Commission (Pet. App. A-29) and the court of appeals (*id.* at A-10 to A-11, A-53) recognized that the unit-train rates between the Twin Ports and Martins Creek were designed to compete with the water/rail rates and water/truck rates between the same points. The court of appeals correctly noted that this evidence gives little support to petitioners' claim of discrimination (*id.* at A-53).

Section 15a(3) of the Interstate Commerce Act (recodified as 49 U.S.C. 10704(a)(2)). That section, which was enacted in the Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 572, provided in pertinent part that:

> Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

In this case, the relief sought by petitioners before the Commission was the cancellation of the unit-train rate on the all-rail route. But it is undisputed that the rate of 72.25 cents per 100 pounds is fully compensatory to the rail carriers and was established to be competitive with the total rate of 71.67 cents per 100 pounds over the lake-rail route. In effect, petitioners seek to prevent the rail carriers from establishing a rate that is competitive with lake carriers, contrary to the requirements of Section 15(a)(3).[9] In *ICC* v. *New York, N.H. & H.R.R.*, 372 U.S. 744 (1963), this Court noted that the policy of Section 15a(3) was to permit each mode of transportation to use its own "inherent advantages, whether they be of service or of cost." 372 U.S. at 756, quoting from S. Rep. No. 1647, 85th Cong., 2d Sess. 3 (1958). The Court also stated (372 U.S. at 759):

> If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and

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[9]Although it may be that the rail carriers might have reduced the five-car rate from Buffalo to Martins Creek to make the revenue/cost ratio on that segment closer to the ratio on the all-rail route, petitioners never requested that relief.

> service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate * * *.

That statement is equally applicable here.[10]

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[10]Petitioners rely on *ICC* v. *Mechling*, 330 U.S. 567 (1947), in support of their discrimination claim, but that case is wholly inapposite. In *Mechling*, several railroads that shipped grain from Chicago to eastern markets charged a higher rate for grain that had been brought to Chicago from western points by connecting barges than for grain that had been brought to Chicago by other railroads, although there were no cost or other operating differences justifying the disparity. This Court held that the disparity discriminated against water carriers in violation of Section 3(4). In contrast, in this case it is undisputed, as the court of appeals found (Pet. App. A-48), that Erie charges the same rate between Buffalo and Martins Creek regardless of whether the traffic arrives at Buffalo by lake carrier or rail carrier. Moreover, nothing in *Mechling* suggests a departure from the principle established in *Western Pacific* and other cases that differences in operating conditions other than cost differences may justify differences in rates. Finally, after the *Mechling* decision Congress enacted the Transportation Act of 1958, which in former Section 15a(3) expressly authorizes the nation's railroads to set rates to compete with water carriers and other transportation modes.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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